

DEPARTMENT OF STATE REVENUE

**LETTER OF FINDINGS NUMBER: 95- 0361 ITC
GROSS INCOME TAX
For Years 1990 AND 1991**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Gross Income Tax –Situs

Authority: 45 IAC 1.1-1-3; IC § 6-2.1-2-2; IC § 6-8.1-5-4

Taxpayer protests assessment on design and/or construction contracts that taxpayer's records show as Indiana based.

STATEMENT OF FACTS

Taxpayer is an out-of-state engineering, development, architectural, and design, construction corporation. The taxpayer maintains no office or permanent employees in Indiana. The company does work within the state and had nexus for construction projects that it oversaw onsite and reported the income from these projects on their Indiana returns. An additional twenty-three design and/or engineering contracts were identified in the audit as having an Indiana situs and an assessment was made on them.

I. Gross Income Tax – Situs

DISCUSSION

Each of the contracts originally assessed was shown in taxpayer's records as having a billing and/or performance location in Indiana. As part of the appeal taxpayer has established some of the contracts as strictly out of state performance and subsequently not subject to the assessment. As to the remainder of the contracts, tax was imposed based on IC § 6-2.1-2-2, which states in relevant part:

An income tax, know as the gross income tax, is imposed upon the receipt of:

....

(2) the taxable gross income derived from activities or businesses or any other sources within Indiana by a taxpayer who is not a resident or a domiciliary of Indiana.

In taxpayer's protest of the initial assessment, taxpayer provided additional information on the assessed contracts. Taxpayer noted:

For those projects which are attributed to a specific job city, the Department has done so only on the basis that these services were "coded to an Indiana location." The Department does not define "coded." The Department is apparently relying on [taxpayer's] records as assigning the contracts to an Indiana city. However, such is not an accurate reflection of the amount of activities attributable to the given locations. Taxpayer protest of June 2, 1995, page 3

Taxpayer's assumption as to its burden of proof under Indiana law is incorrect. IC § 6-8.1-5-4 states:

Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. IC § 6-8.1-5-4(a)

The audit and assessment were based on the logical inference that construction service contracts for a location in Indiana would have an Indiana situs. The assessments were made based on the finding by the auditor of an Indiana business situs as defined by 45 IAC 1.1-1-3 (formerly 45 IAC 1-1-49) stating:

Business Situs Defined. For purposes of these regulations a taxpayer may establish a "business situs" in ways including, but not limited to, the following:

- (1) Use, occupancy or operation of an office, shop, construction site, store, warehouse, factory, agency route or other place where the taxpayer's are on;
- (2) Performance of services;

Of the 23 contracts in dispute, thirteen were removed from the assessment based on the additional information as noted above. Taxpayer provided no additional information for four of the remaining contracts, and the additional documentation as to the remaining 6 contracts demonstrate a contractual requirement for taxpayer to have staff onsite with supporting evidence including travel and lodging vouchers for said staff and/or are insufficient to demonstrate a lack of Indiana situs. Based on the available information and the requirements of IC § 6-8.1-5-4, the assessment will remain on these contracts, identified in the record as job numbers: 9181, 10700, 10731, 11078, 11203, 11314, 11452, 11456, 11476, and 11663.

FINDINGS

Taxpayer protest sustained in part and denied in part.

JM/BK/MR--002101